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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS ARTURO SANCHEZ,

Defendant and Appellant.

G047666

(Super. Ct. No. 11CF2839)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed in part and reversed in part.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Marcos Arturo Sanchez of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1), repealed by Stats.2010, ch. 711, § 4; all further statutory references are to the Penal Code unless otherwise stated), possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)), and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury found true a gang enhancement allegation (§ 186.22, subd. (b)(1)) in connection with the first two charges. The trial court bifurcated the trial on the state prison allegation (§ 667.5, subd. (b)). After the jury returned its verdict, defendant admitted he served a prior term in state prison. The court sentenced defendant to seven years in state prison. The sentence consisted of a three-year term on the Health and Safety Code violation, plus a consecutive three-year term on the gang enhancement attached to that count, and a one-year term on the state prison enhancement. The court imposed concurrent terms on the remaining counts and gang enhancement.

In our prior published opinion, *People v. Sanchez* (2014) 223 Cal.App.4th 1, review granted May 14, 2014, S216681, we accepted the Attorney General's concession that because defendant acted alone, his conviction for active participation in a criminal street gang was not supported by sufficient evidence and must be reversed in accordance with our Supreme Court's opinion in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*). However, we rejected defendant's contention that the true findings on the gang enhancement allegations (§ 186.22, subd. (b)(1)) in connection with the substantive gang crime and the possession of a controlled substance count (which was not challenged by defendant on this appeal) were not supported by substantial evidence. In particular, we rejected defendant's contention the gang enhancements must be reversed because defendant acted alone and because the trial court erred by admitting hearsay to prove the enhancement allegations. We reversed defendant's conviction for the substantive gang crime and affirmed the judgment as modified.

On review, in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), the Supreme Court concluded much of the evidence admitted to prove the gang allegations was inadmissible hearsay and the error in admitting the hearsay was not harmless beyond a reasonable doubt. Accordingly, the Supreme Court reversed the true findings on the gang enhancements, otherwise affirmed the judgment of conviction, and remanded the matter back to this court for further proceedings consistent with its opinion. On remand, neither party filed supplemental briefing as permitted by California Rules of Court, rule 8.200(b).

The decision of the Supreme Court in *Sanchez, supra*, 63 Cal.4th 665, dealt solely with the issue of whether evidence admitted to prove the gang enhancement allegations was inadmissible hearsay and did not address defendant's alternate argument made in this appeal that a defendant cannot be subject to a gang enhancement under section 186.22, subdivision (b)(1), when he acted alone. Accordingly, we adopt and incorporate by reference the Supreme Court's statement of the facts and its discussion and conclusions concerning the admission of hearsay to prove the gang enhancement allegations.

We reiterate our original conclusion that, as conceded by the Attorney General, defendant's conviction on count three of the information must be reversed because a defendant cannot be convicted of actively participating in a criminal street gang (§186.22, subd. (a)), when he acted alone. (*Rodriguez, supra*, 55 Cal.4th at p. 1134 [substantive offense of active gang participation requires defendant "commit underlying felony with at least one other gang member"].)

We similarly reiterate our original conclusion that a majority of the Supreme Court in *Rodriguez, supra*, 55 Cal.4th 1125, has concluded that although the substantive gang crime set forth in subdivision (a) of section 186.22 requires more than a lone actor, the gang enhancement provided in section 186.22, subdivision (b)(1), does not. Therefore, an individual who acts alone in committing a gang-related crime with the

specific intent to promote, further, or assist criminal conduct by gang members, is subject to the gang enhancement provided in section 186.22, subdivision (b)(1). However, under compulsion of the Supreme Court in *Sanchez, supra*, 63 Cal.4th 665, the true findings on the gang enhancement allegations must be reversed because of the admission of hearsay evidence to prove the allegations, which admission was not harmless error.

DISPOSITION

The conviction in count three for violation of section 186.22, subdivision (a), is reversed. The true findings on the section 186.22, subdivision (b)(1), street gang enhancements are reversed. The judgment of conviction is otherwise affirmed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.